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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COUNTY OF ORANGE, Plaintiff and Respondent, v. FARAMARZ FATEHI, Defendant and Respondent; PONTEA DAVOUD, Appellant.	G041025 (Super. Ct. No. 00FL007289) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Lon F. Hurwitz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded as directed.

Mohammad A. Fakhreddine for Appellant.

No appearance for Plaintiff and Respondent.

No appearance for Defendant and Respondent.

This is the third appeal we have considered arising from the highly contentious marital dissolution of Faramarz Fatehi (Father) and Pontea Davoud (Mother). Whereas the prior appeals concerned child custody issues, this appeal challenges the family court's order regarding child support arrears. In August 2008, the trial court determined Father owed child support arrears from September 2002 to November 2003, and from January 2006 to the present. The court determined Father did not owe arrears from December 2003 to December 2005 when he was primarily responsible for the couple's two children. The release from support payment for those two years, referred to in family law as a *Jackson*[1] credit, is the sole basis of Mother's appeal.

FACTS

Because the sole issue raised in this appeal concerns the calculation of child support arrears, we will limit our discussion of the facts accordingly. A detailed summary of the procedural history of the case, dating back to 2000, is contained in our prior opinions (*In re Marriage of Fatehi* (G035148) May 31, 2006 [nonpub. opn.]; *In re Marriage of Fatehi* (G037459) June 13, 2007 [nonpub. opn.]).

The original dissolution judgment in 2001, based on a stipulation provided by the parents, ordered joint legal custody and awarded Mother sole physical custody of the children. Father was given liberal visitation rights (Wednesday night to Saturday morning every week, and Saturday night until Monday morning every other week). The court made a temporary child support order of $700 pending a further hearing. In October 2001, the court set child support at $1,010 per month.

In September 2002, the court significantly reduced Father's child support obligation to $179 per month (based on what we now know to be perjured financial documents). Soon thereafter, Mother enrolled in a nine-month cosmetology program with a plan to find a job and supplement her income. Mother made an agreement with

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[1] *Jackson v. Jackson* (1975) 51 Cal.App.3d 363 (*Jackson*).

Father to have the children stay with Father's parents while she was in school. They agreed the children would return to her care during the summer break and after she graduated from the cosmetology program in November 2003. All did not proceed as planned.

Father stopped paying child support when Mother entered school. When she graduated in November 2003, he refused to return the children. Rather, on December 3, 2003, Father obtained by an ex-parte motion, an order temporarily changing the custody and visitation schedule, giving Father sole physical custody and keeping his eldest daughter enrolled in a school near him. Father alleged Mother had relinquished custody to him, Mother was abusing the children, and they wanted to live with him. Mother refuted these allegations, stating the children stayed primarily with their grandparents while they attended school but lived with her during the summer, school holidays, and each weekend. Mother asserted that when she finished her cosmetology program, Father broke his promise and refused to allow the children to go back to her.

Unfortunately, due to Father's many requests for continuances, the hearing was not held until over one year later. In December 2004, the court concluded it would be best to maintain the status quo and it changed the custody order to joint custody. While Mother's appeal of this order was pending, the parties stipulated in December 2005 to joint legal and physical custody of the children. Father cared for the children two nights, having the children after school each Thursday until Saturday night. Mother cared for the children the remainder of the week. When we filed our opinion in May 2006 reversing the 2004 order, the trial court correctly determined the parties' 2005 stipulation to joint custody was controlling (and essentially rendered our opinion moot). The following year, we in turn, affirmed this ruling in Mother's next appeal. (See *In re Marriage of Fatehi*, *supra*, G037459.)

But the saga continued. Mother discovered Father had committed perjury in 2002 when he sought and obtained a reduction in the child support order from $1,010

to $179. In August 2006, she filed a motion to set aside the 2002 child support order. The matter was heard in March 2008. The court determined Father had committed perjury as to his employment and income in 2002. It set aside the 2002 order reducing child support, and reinstated the prior order. The court ordered the Department of Child Support Services to recalculate the seven years of arrears based upon a child support amount of $1,010 (from November 1, 2001, to March, 31, 2008). It set a hearing date and the parties submitted documents in support of their respective arguments. Mother provided this court with some but not all the documents filed.

The hearing was held on August 8, 2008. After considering testimony from the parties, the court concluded Father owed child support arrears from September 2002 to November 2003, and from January 2006 to the present.[2] The court determined Father did not have to pay child support from December 2003 to December 2005 (*Jackson* credits) when he was primarily responsible for the children. Mother disputed Father's right to equitable relief from child support payments for two years, arguing Father had unclean hands having committed perjury and false allegations of abuse to mislead the court into changing the custody order. She also argued Father did not have sole custody of the children from December 2003 to December 2005. Mother asserted Father's child support could have been reduced, but it should not have been totally eliminated during that time period.

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[2] The court's minute order contains an inconsistency that we have corrected. The court's order stated arrears were owed from "9/01/02 to 11/30/03 and 1/01/05 to the present." But it credited Father "for the time period of 12/01/03 through 12/31/05." It appears the entire year of 2005 was mistakenly included in both rulings. Based on our review of the reportor's transcript and documents regarding the parties' custody arrangements, we conclude the court intended to award *Jackson* credits for the year 2005. At the end of 2005, the parties stipulated to share joint physical and legal custody of the children, triggering again Father's child support obligation. Arrears should be calculated starting January 1, 2006 (rather than January 2005 as stated in the minute order). On remand, the trial court should correct this error nunc pro tunc.

The trial court discussed the reasons for awarding child custody credits and the two primary cases explaining the basis for awarding such equitable relief. (*In re Marriage of Okum* (1987) 195 Cal.App.3d 176 (*Okum*); *Jackson, supra,* 51 Cal.App.3d 363.) The parties and the court had a lengthy discussion about whether a partial or a total *Jackson* credit should be awarded to Father. The court decided on a 100 percent credit, stating: "[T]he real question is what is the threshold at which *Jackson* is applied. If clearly *Jackson* and *Okum* say it's an equitable consideration by the court, and [Mother's counsel] is right, I don't have to completely apply *Jackson*, I don't have to give a 100 percent credit. I think both the cases tell us that. But I have trouble with the fact that neither case gives us a formula upon which to base something other than a 100 percent credit. And in the absence of that formula being provided to me by the court of appeal, I don't think that I necessarily want to engage in that exercise. Okay." Father's counsel asked, "You don't want to break new law here?" and the court replied, "No."

DISCUSSION

Actions to determine child support arrearages are equitable proceedings in which the trial court is permitted the broadest discretion to achieve fairness and equity. (*In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1154, superseded by statute on other grounds as stated in *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 185 & fn. 6.) The trial court in this case stated it understood it had discretion to apply equitable considerations, yet the record reflects the court was unconvinced or unwilling to "engage in that exercise" of formulating an order to achieve fairness and equity. The court's statements show it was under the mistaken impression its discretion was limited to an all-or-nothing award of *Jackson* credits. Lamenting the lack of a formula from the appellate courts, the trial court applied an equitable remedy it knew did not exactly or fairly fit the circumstances of the case before it.

However, this kind of equitable remedy necessarily is dependent on the particular facts of the case, and fairness cannot be achieved by use of rigid formulas. By taking an all or nothing approach, the court in essence failed to exercise its discretion. We remand the case for reconsideration in light of our discussion below regarding the equitable principles discussed in *Jackson* and other cases applying *Jackson* credits.

In *Jackson, supra*, 51 Cal.App.3d 363, a noncustodial parent (the father) provided a home and financial support for his daughter in excess of the court-ordered support obligation. The court concluded the father, by assuming exclusive and sole custody, had "expended amounts well in excess of the court-ordered $750 per month." (*Id.* at p. 368.) The court reasoned, "While it is true that an order for child support may not be retroactively modified (Civ. Code, § 4700) and that accrued arrearages are treated like a judgment for money [citations] it must be remembered that such orders are an exercise of the court's equitable power and are designed to compel satisfaction of the child support obligation which exists apart from the marriage status. The obligation is to the child and not to the mother. [Citations.]" (*Jackson, supra,* 51 Cal.App.3d at pp. 366-367.)

The *Jackson* court held, "The purpose of the child support order was to insure that [the daughter] was properly cared for and was not to provide [mother] with a weapon to be used retributively against [the father]. [¶] Thus we conclude that the trial court would have been well within its discretion in recalling and quashing the writ of execution or permitting only partial enforcement on the basis that [the father] had directly discharged his obligation or on the basis of equitable considerations." (*Jackson, supra,* 51 Cal.App.3d at 368.)

In *Okum, supra*, 195 Cal.App.3d 176, the facts of the case warranted a *Jackson* credit for one child but not another. In that case, husband and wife orally modified their child custody agreement whereby husband assumed de facto sole physical custody of his two children from September to March, during which time wife would

visit on Wednesdays and every other weekend. (*Id.* at p. 179.) For the remainder of the year, wife had sole physical custody and husband had liberal visitation. (*Ibid.*) Husband agreed to pay $225 per month for each child, as well as clothing, school, medical expenses, and extracurricular activities. (*Ibid.*) Husband ceased making payments when the parties again orally agreed to modify the custody arrangement. His daughter, Gina, began to reside with husband full time. His son, Christopher, was spending more time with him.

The *Okum* court determined wife had no expenses related to Gina and she had orally agreed to eliminate the child support obligation. It concluded husband was "'entitled to an equitable reduction of $225 per month'" for the time period in question ($14,175 total). (*Okum*, *supra*, 195 Cal.App.3d at pp. 180-181.) However, the court decided the same was not true as to the couple's son Christopher. The record showed wife had kept substantial custody of him and had incurred expenses in raising him. The court noted, "[S]he kept a bedroom readied for Christopher's exclusive use when he stayed at her home; and . . . she paid for his food, clothing, school supplies, tutoring, gifts, entertainment, and vacations when he was in her care. Whether or not [wife] actually spent a total of $14,175 on the son misses the point. Neither the law nor the couple's agreement required [wife] to keep a precise running total of the monies she expended on the child. The evidence establishes that during the period in question she substantially complied with the custody agreement, and therefore, [husband] was obligated to pay support. Had [father] wanted to disengage from the agreement, he could have applied to the court seeking a modification of the support order based on changed circumstances." (*Id.* at pp. 182-183, fn. omitted.)

Jackson credits need not be an all-or-nothing equitable award. "[T]he trial court may give credit for past overpayment, permit only partial enforcement or . . . quash, in toto, a writ of execution directed against a parent in arrearage who, during the period in

question, has had the sole physical custody of the child, or take into consideration whether the debtor had satisfied or otherwise discharged the obligation imposed by the original order . . . ." (*Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 858-859, internal citations and quotation marks omitted [wife ordered to pay child support was entitled to a set off for arrearages husband owed while child was in her care].) Stated another way, it is well settled a trial court may properly consider whether there are equitable reasons for reducing *or* entirely eliminating a parent's support obligations in order to achieve a fair result.

This case presented several equitable considerations. It cannot be overlooked that in the beginning Father was ordered to pay Mother $1,010 for child support despite having a timeshare arrangement by which he cared for the children approximately 40 percent of the time. It is undisputed that for the period of time Mother attended school, "the parties exercised a very generous timesharing arrangement," and yet, the trial court concluded Father was still obligated to pay Mother $1,010. During the two-year time period in question (December 2003 to December 2005), Father single-handedly altered the custody arrangement to increase his time with the children to approximately 70 percent for the months the children were in school. The parties disputed, and the court did not make any factual findings, as to the timeshare arrangement occurring when the children were on their summer break or during other school holidays: Father asserted it was a 50/50 timeshare arrangement. Mother claimed it was closer to a 60/40 time split again. The parties also disputed who paid for after school activities and other expenses during the two-year time period in question. But because neither parent had exclusive custody or control of the children, it cannot be said either parent was 100 percent responsible for all the expenses. Finally, in December 2005, when the custody order was again modified to give Mother a larger timeshare (five nights of the week), the court reinstated Father's full $1,010 child support obligation.

To summarize, certainly a shift in expenses occurred during the two-year period Father primarily cared for the children. But the court's determination Father was entitled to a complete elimination of his support obligation *to the children* does not appear to achieve a fair result. As noted in *Okum*, whether Father's expenses increased $1,010 per month misses the point. He did not have exclusive custody, and it is disputed whether he paid for all their expenses during the two-year period. Mother did not want or request the reduction but rather fought Father for more time. Father did not seek to modify his support obligation.

Based on the various equitable considerations discussed above, the trial court must decide if the modified timeshare for those two years warranted a reduction in Father's support obligation *to his children*, and if so, by how much. This depends entirely on the trial court's assessment of the parties' credibility as to their expenses and time caring for the children. It cannot be decided by this court in the first instance.

Mother argues it is inherently unfair to reward Father by eliminating his child support obligation for two years. She argues the custody modification can be directly traced back to Father's perjury and false accusations of abuse. True, he comes to the court seeking equitable relief with very dirty hands. Certainly, Father's long history of deceitful conduct should reflect negatively on his credibility with the trial court. But as noted above, the primary focus of a *Jackson* credit inquiry rests on an equitable evaluation of whether the children received the financial support they were owed. The obligation ultimately is to the children, not either parent. It is a difficult but necessary duty for the trial court to make factual findings regarding disputed facts and assess the credibility of the parties in determining to what extent *Jackson* credits were warranted.

DISPOSITION

The court's order regarding the recalculation of child custody arrears is reversed and remanded as directed. In all other respects, the trial court's order is affirmed. Mother may recover her costs on appeal.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.